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March 15, 2005

Name of Case: Personnel Security Hearing

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Case Number: TSO-0073

This Decision concerns the eligibility of XXX XXX XXX ("the individual") to hold an access authorization under the Department of Energy (DOE) regulations set forth at 10 C.F.R. §710, Subpart A, entitled "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."¹ In view of the record and, in particular, medical and other testimony given in a hearing held on January 25, 2005, I have concluded that the individual's request for access authorization should be granted.

Background

Application was made for the individual – who is employed by a contractor at a DOE facility – to be granted an access authorization (security clearance). A background investigation and Personal Security Interview (PSI) were conducted. From these came a recommendation for a Psychiatrist interview that was conducted in August 2002. As a result of the investigation, PSI and interview, on May 2, 2003, a Notification Letter was issued by the local DOE security office stating that, based on the criteria set forth in 10 C.F.R. §710.8, substantial doubt existed as to the individual's eligibility for a security clearance.

Notification Letter

¹ Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. §710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

The Notification Letter states that under the criterion found at Section 710.8, paragraph (j) the individual “is a user of alcohol habitually to excess and alcohol dependent without adequate evidence of rehabilitation or reformation.” *Notification Letter Attachment at 1.* The letter enumerates a number of alcohol-involved incidents – four arrests for driving while intoxicated (DWI) and an altercation in a bar – beginning when the individual “was 17 years old” (approximately 1980) until April 1997.

On the basis of these incidents and the results of the August 2002 Psychiatrist interview, the Letter states that “alcoholism . . . causes, or may cause, a significant defect in the judgment or reliability of” the individual. *Id.* Finally, the letter advises the individual that under 10 C.F.R. Section 710 administrative procedures exist through which concerns about requests for security clearance may be reviewed. *Id.* This office received the individual’s request for a hearing on November 12, 2003.

Record

The record as summarized in the Notification Letter is uncontested:

- In 1980 the individual was twice arrested for DWI and went to “DWI school” for one of those arrests.
- “He received another DWI sometime in 1990 and stayed two days in jail.”
- In “early 1992, he was charged with assault for throwing a guy into a group of people at a bar.”
- In “April 1997 he was arrested for DWI, lost his drivers license and volunteered for counseling. He (had) difficulties with . . . work because he lost his license.”
- “He was an alcoholic in 1997 and 1998.”

Notification Letter, Attachment at 1.

Three years ago, at the time of the psychiatric interview, the individual’s history with alcohol – how much or often he drank, when and if he had stopped drinking and why – was anecdotal or in dispute. The individual insists that he stopped consuming alcohol in March, 2002. The record of the August 2002 psychiatric record is not dispositive. What is clear from the report of the psychiatric interview is that before he could be considered

reformed, the individual had to stop drinking for two years under some type of recovery program, or to have stopped for three years without supervision.

Between my receipt of the hearing request and the January 25, 2005, hearing, 14 months elapsed. The bulk of that period passed while the individual unsuccessfully sought a “self-exculpatory polygraph” under the provisions of 10 CFR Section 709. The examination was requested by the individual to allow him an opportunity to try to resolve in his favor the claim that he had stopped drinking in March of 2002, *i.e.*, well before the psychiatric interview.

Concerning polygraphs, the applicable regulatory provisions describe “the categories of individuals who are eligible for . . . polygraph testing.” 10 C.F.R. § 709.1 Included in that coverage are “positions where the applicant or incumbent *has requested* a polygraph examination in order to respond to questions that have arisen in the context of . . . personnel security issues.” 10 C.F.R. § 709.1 and 4 (a) (10) (emphasis supplied). This is termed a “self-exculpatory polygraph.” Although not entirely clear, it appeared to me that the individual was arguably entitled to receive such an examination in the context of the personnel security clearance process.

All this notwithstanding, the individual’s request for a polygraph was never acted on affirmatively. After more than a year, I saw no choice but to schedule the January 25, 2005, hearing under 10 C.F.R. part 710. The last communication in the polygraph saga arrived here the day before the hearing. It is a copy of a January 20, 2005 letter to the individual rejecting the polygraph questions which the individual had been asked to propound for the self-exculpatory examination. *January 20, 2005 letter from Dan Richer, Manager, Personnel Security Division.*

Hearing

The hearing was held on Tuesday, January 25, 2005. Appearing for DOE were Counsel, a DOE-sponsored Psychiatrist and, by telephone, a DOE Security Specialist. On behalf of the individual four friends, acquaintances and coworkers appeared, as well as his girlfriend of 15 years.

DOE Security Specialist

The DOE Security Specialist testified by telephone as to the accuracy of the record concerning the PSI, and the unsuccessful request for the self-exculpatory polygraph. The Security Specialist could not offer any testimony as to the individual's continuing assertion that he had stopped drinking alcohol several years before, in March, 2002.

The Individual's Witnesses

Five persons testified for the individual. Ten colleagues and personal friends of the individual submitted written material attesting to his honesty, his character and his sobriety. A letter from Aparimita Llahiri, M.D., of Aspen Medical Care Associates was provided attesting to the individual's sobriety.²

The first witness had known the individual since hiring him in May, 2001, and sees him daily. The witness has also had some social and other involvement with the individual and has therefore seen him in a variety of settings for nearly four years. He knew of the individual's DWI's, believes that he had some influence on the individual's decision to stop drinking and testified without qualification that the individual had not consumed any alcohol since 2002. *Transcript of January 25, 2005 Hearing (Tr.) at 38-48.*

The next witness has a career background in the transportation of nuclear materials as a courier and supervisor. As such he was extensively versed in security matters, including being trained to recognize when an individual was impaired by alcohol and other substances. He has known the individual on and off the job since 2003 and testified without qualification that he had never seen the individual impaired or even consuming alcohol. *Tr. at 50-59.*

The third witness is the individual's supervisor and has known the individual on the job for the last four years. He testified as to the individual's good character, outstanding work habits and asserted unequivocally that he had never seen the individual drink alcohol or be impaired. *Tr. at 61-69.*

² The letter also explains, with accompanying documentary laboratory and other medical testing material, the result of a liver enzyme test administered to the individual which appeared to indicate alcohol consumption. Instead, the result stemmed from low testosterone levels and an associated affliction. When those conditions were successfully treated, the irregular liver enzyme test result that indicated *possible* alcohol consumption returned to normal and the issue was resolved in the individual's favor. *Letter (and attachments) from Aparimita Lahiri, M.D. dated March 5, 2004.*

The fourth witness has known the individual since childhood and has seen him on and off the job since 1997 or 1998. He knew of the individual's history with alcohol and testified that he had not actually seen the individual drink alcohol for four years or more. Like several other witnesses, he testified that the individual is a very determined man and that "when he says he's going to do something (e.g., stop drinking), he . . . does." *Tr. at 76*. Also like others, this witness testified that the individual is not drinking any more. *Tr. at 72-85*.

The last witness for the individual was his girlfriend with whom he resides. They have been together for 15 years. She testified that the individual had consumed alcohol at one time but had stopped, and that she had not seen him drink for three years. She also stated that there is no alcohol in their house. *Tr. at 87-93*.

In summary, every witness was well acquainted with the individual personally and/or worked closely with him. All saw the individual on a regular basis either during working hours and/or afterwards. In addition, a number had extensive, career experience with security concerns and procedures as well as with substance abuse. The testimony of the witnesses covered the totality of the individual's working and non-working life beginning with 1998 until the present, with emphasis on the last three years.

Concerning the weight accorded the witnesses, it is important to understand that the individual leads a very structured working life. He lives a substantial distance from his job site so that merely commuting requires several hours daily. That means rising very early, driving for approximately 90 minutes, working a full day, commuting again, and then a period at home and sleep. Accounting for each of these periods – when arriving at work, during the day, and when arriving home – convincing witness testimony was offered stating categorically that the individual was not consuming or under the influence of alcohol at any of these times. Witness testimony was also given for weekend activities. Each witness testified convincingly and without reservation that the individual had stopped drinking alcohol and/or had not to their knowledge ever taken a drink during the last three years.

The DOE-Sponsored Psychiatrist

The DOE-sponsored psychiatrist was present for the entire hearing prior to testifying. The psychiatrist testified as to his previous findings. He also re-

interviewed and re-evaluated the individual based upon the testimony of the individual, the written medical testimony³ provided for the record, and all of the witness testimony. In view of all the evidence and the fact that the individual has abstained from alcohol for three years – the DOE psychiatrist diagnosed the individual as being in full remission. *Tr. at 125.*

The crucial portion of the transcript follows:

Psychiatrist: When I reviewed this case last night, I was just thinking, as I was reviewing, I just hope he's not drinking, because it's three years, and no matter what else he's done, he doesn't have to go to rehabilitation, as long as he can prove that he's not drinking, or present good, strong evidence he's [not] . . . I'm going to be able to be favorable.

Counsel: In your opinion, would he (the individual) – is he – based on your diagnosis, does he need to remain (sober) for the rest of his life?

Psychiatrist: Yes.

. . . .

Counsel: And the real crux question here is, and you may have already answered it, but I want to make sure there is no misunderstanding, do you believe he (the individual) has met your criteria for rehabilitation or reformation.

Psychiatrist: He has met my criteria for adequate evidence of reformation.

Counsel: That's because –

Psychiatrist: Yes.

Counsel: --he (the individual) has not consumed any alcohol for almost three years, is that correct?

Psychiatrist: That's correct. And I believe the evidence is very strong.

³ See note 2, *supra*.

Counsel: You were impressed with what you heard today, that he (the individual) is not drinking?

Psychiatrist: Yes.

Counsel: All right. I don't have any other questions.
Tr. at -125-6

Standard of Review

Applicable DOE regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). In resolving questions about the individual's eligibility for access authorization, one must consider the relevant factors and circumstances connected with the individual's conduct, set out in Section 710.7 (c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; how recently and often the conduct occurred; the age and maturity of the individual at the time of the conduct; whether participation was voluntary; rehabilitation, reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors.

A DOE administrative review proceeding under 10 C.F.R. Part 710 is authorized when the existence of derogatory information leaves unresolved questions about an individual's eligibility for access authorization. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 CFR § 710.21(b) (6). Once DOE has presented derogatory information affecting an individual's eligibility for access authorization, the individual must come forward with evidence to convince DOE that restoring his or her access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." *See, e.g., Personnel Security Hearing* (Case No. VSO-0013), 25 DOE ¶ 82,752 at 85,511 (1995), and cases cited therein. The DOE regulations were amended in 2001 to state that any doubt regarding an

individual's eligibility for access authorization shall be resolved in favor of the national security. 10 C.F.R. § 710.7(a).

Analysis & Decision

It is clear from the foregoing that the individual has fully resolved the concerns in the Notification Letter which led to this proceeding.⁴ He has ceased drinking alcohol, he has been abstinent for three years as the DOE-sponsored psychiatrist stated would be necessary, and that psychiatrist has himself testified that the individual is rehabilitated and recovered from his alcohol problem. Thus any concerns as to the individual's holding a security clearance have been resolved. Under these circumstances -- where the record and the DOE-sponsored psychiatrist support granting the request for access authorization -- I conclude that the concern has been resolved.

Conclusion

Based on the hearing and the full record in this proceeding, I find that the individual has fully resolved the security concerns presented under 10 C.F.R. § 710.8(j). For the reasons explained in this Decision, I find the individual has shown that granting him access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, it is my decision that the individual be granted access authorization. Review of this Decision by an Appeal Panel may be sought under the regulation set forth at 10 C.F.R. § 710.28.

Richard T. Tedrow
Hearing Officer
Office of Hearings and Appeals

Date: March 15, 2005

⁴ This includes the elevated liver enzyme matter discussed in note 2, *supra*.